

21 November 1945

Mr. Charles C. Niehuis  
Director of Information  
Arizona Game and Fish Commission  
Phoenix, Arizona

**LAW LIBRARY**  
**ARIZONA ATTORNEY GENERAL**

Dear Mr. Niehuis:

This is in reply to your letter requesting our interpretation of Section 57-126 of the Arizona Game Code, amending Section 57-146, Arizona Code Annotated 1939, with particular reference to the maximum and minimum fine which may be imposed under its provisions.

Said section provides that unless a different or other penalty or punishment is herein specifically prescribed, a person who violates any provision of this Act, or who violates or fails to comply with any lawful order, rule, or regulation adopted by the Commission, is guilty of a misdemeanor.

That in addition to the above said section also provides:

" \* \* \* and in addition thereto, is liable to an additional penalty of twenty-five dollars (\$25.00) for each animal, bird, or fish, or part thereof, or each nest or egg of any bird bought, sold, offered for sale, taken, possessed, or transported, in violation of this act. \* \* \*"

Said section further provides in certain cases that upon conviction the person:

" \* \* \* shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than three hundred dollars (\$300.00), or by imprisonment in the county jail for not less than three (3) months nor more than six (6) months, or by both such fine and imprisonment; and, in addition thereto, is liable to an additional penalty of fifty dollars (\$50.00) for each animal or part thereof, or fish, taken, destroyed, possessed, transported, bought, sold, or offered for sale in violation of this act. \* \* \*"

Section 43-110, A.C.A. 1939, provides as follows:

"Except when a different punishment is prescribed by this Code, \* \* \* every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six (6) months, or by a fine not exceeding three hundred dollars (\$300.00), or by both. \* \* \*"

With regard to the question of jurisdiction under this statute, Section 44-3201 sets forth the misdemeanors over which the justice of the peace shall have jurisdiction as follows:

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" \* \* \* and all misdemeanors punishable by fine not exceeding three hundred dollars (\$300.00), or imprisonment not exceeding six (6) months, or by both such fine and imprisonment. \* \* \*"

In the case of Brookzer vs. State, reported in 14 Ariz. 546, the Supreme Court of Arizona says:

" \* \* \* The test of the jurisdiction of the justice of the peace in this case, as in all others, is whether the maximum penalty that may be imposed upon convictions is greater than he is authorized to inflict. If the penalty may be greater than the maximum that he can impose, then he is without jurisdiction. \* \* \*"

The question to be determined, therefore, is whether the provisions above cited, providing for additional penalties for each animal, bird, or fish, or part thereof, taken, destroyed, possessed, transported, bought, sold, or offered for sale, in violation of this Act, is a part of the fine or whether it is an additional penalty to be recovered by the state in some other manner than under the criminal prosecution. If the former, the justice of the peace is without jurisdiction to entertain violations of the Game Act; if the latter, he has jurisdiction.

This office is of the opinion that the legislature in passing the game law intended that the additional penalties provided for are not to be construed as a part of the fine, but that the word "penalty" was used in its restricted sense and does not include any idea of criminal punishment. It is merely an amount fixed to be recovered by the state in its discretion. Although the recovery may be sought in the form of a civil action, such a proceeding in nature and effect is a proceeding for the punishment of a criminal offense and should substantially adhere to the essential principles governing such proceedings that the rights of the citizen may be properly protected. Commonwealth vs. Davison, 11 Pa. Super. 130. In support of this view we cite the following authorities:

"A fine is imposed in a criminal action or proceedings, but a penalty ordinarily is recoverable in a civil action." 36 Corpus Juris Secundum 781; City of Buffalo vs. Neustadt, 204 N.Y.S. 737.

"The word 'penalty' is also properly used in a narrower sense, to indicate a sum of money exacted because of a wrong to the state." RESTATEMENT, CONFLICT OF LAWS, Section 611c.

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"'Penalty' and 'fine' are not the same in law. A penalty is always recoverable in a civil action, a fine never is. A penalty when recoverable goes to the party suing; a fine to the people. A fine is defined in law to be a pecuniary punishment imposed upon a person convicted of a crime or misdemeanor." City of Hudson vs. Granger, 52 N.Y.S. 9.

"A 'fine' is usually a sum of money exacted from a person guilty of a crime as a pecuniary punishment, while a 'penalty' is that which is demanded for the violation of a statute, which may or may not be a crime." State vs. Liggett & Meyers Tobacco Company, 172 S.E. 857, 865.

It would seem from a common-sense view that if the legislature wished to make the fine greater than \$300.00, they would have done so in the main part of the section providing for the fine, and having set the fine and penalty forth as two different things, it seems clear that it was differentiating between the fine and the additional penalty.

We believe that a justice of the peace under this section would not have jurisdiction to assess the additional penalties prescribed for each animal, etc., in the criminal proceeding; but that he is confined to imposing a fine of not more than \$300.00 or imprisonment for not more than six months, or both such fine and imprisonment.

Very truly yours,

JOHN L. SULLIVAN  
Attorney General

EARL M. LINES  
Assistant Attorney General

EML:s

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